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Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1996

AMRIT LAL,
Petitioner

vs.

BOROUGH OF KENNETT SQUARE,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE COMMONWEALTH COURT
OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I

Are fines imposed under a municipal building and housing ordinance upon a criminal defendant excessive under the Eighth Amendment to the United States Constitution when the fines range from $300 to $1000 and total $14,500 for de minimis violations such as dripping faucets and missing kitchen drawers especially in view of the fact the municipality was previously awarded monetary relief in an equity proceeding and was subsequently awarded more than $11,000 in attorney's fees in a subsequent appeal?

II

Is a municipal building and housing ordinance enforced against a lessor of residential apartments for de minimis violations such as dripping faucets and missing kitchen drawers a deprivation of the lessor's Fourteenth Amendment right to due process because the enforcement of the ordinance bears no reasonable relation to the health, safety and welfare of the public?

III

Is the criminal prosecution of violations of a municipal building and housing ordinance a violation of the Fifth Amendment protection against double jeopardy where the same ordinance violations formed the subject matter of a previous proceeding in equity in which the equitable relief granted to the municipality was, in part, punitive in purpose and effect?

IV

Is a criminal defendant deprived of his Sixth Amendment right to assistance of counsel when the trial court proceeds with prosecution of an ordinance punishable by fines where defendant asserts that he is willing to pay for counsel but is unable to find counsel willing to represent him due to his reputation in the community that he is in strong disfavor with the court?

V

Is it a violation of the Fourteenth Amendment right to Due Process and Equal Protection where fines are imposed in a criminal proceeding to enforce a municipal building and housing ordinance subsequent to a proceeding in equity in which the municipality was awarded equitable relief for the same ordinance violations where the law of the State clearly disallows remedy in both equity and at law at the same time?

PARTIES

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

AMRIT LAL, Petitioner
vs.
BOROUGH OF KENNETT SQUARE, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE COMMONWEALTH COURT
OF THE COMMONWEALTH OF PENNSYLVANIA

Petitioner, Amrit Lal, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Commonwealth Court of Pennsylvania, which opinion was denied review by the Supreme Court of Pennsylvania after appeal and motion for reconsideration were taken, which Commonwealth Court decision **refused to find** that fines imposed under a municipal building maintenance ordinance were excessive under the Excessive Fines Clause of the Eighth Amendment to the United States Constitution; **refused to find** the municipal building maintenance code was enforced against Petitioner without reasonable relation to the health, safety, and general welfare of the community in

violation of Petitioner's right to due process under the Fourteenth Amendment to the United States Constitution; **refused to find** the imposition of fines under a municipal building maintenance ordinance was a violation of Petitioner's protection from Double Jeopardy where prior to the imposition of the fines, in a proceeding in equity, relief was granted the municipality upon the same ordinance violations and such relief was, in part, punitive in purpose and effect so as to render it criminal punishment in part; **refused to find** Petitioner was deprived of his right to counsel in violation of the Sixth Amendment to the United States Constitution; and **refused to find** the imposition of fines under a municipal building maintenance ordinance subsequent to a proceeding in equity in which the municipality was awarded equitable relief for the same ordinance violations was a violation of Petitioner's right to due process and equal protection under the Fourteenth Amendment of the United States Constitution where the law of "election of remedies" of the Commonwealth of Pennsylvania disallows remedy in both equity and at law at the same time.

OPINIONS BELOW

The opinion of the Commonwealth Court of Pennsylvania is reported as Borough of Kennett Square v. Lal, 665 A.2d 15 (Pa.Cmwlth. 1995) and appears in Appendix A to this Petition.

JURISDICTION

The Commonwealth Court of Pennsylvania's Opinion in this matter was filed on August 11, 1995. A timely Petition for Reconsideration was filed pro se and denied by the Commonwealth Court of Pennsylvania on September 13, 1995. Notice of such denial of

reconsideration was never sent to the pro se Petitioner. A Petition to the Supreme Court of Pennsylvania for Permission to File Allocatur Petition Nunc Pro Tunc was filed and denied by that court on December 20, 1995. A timely Petition for Reconsideration was filed and denied by the Supreme Court of Pennsylvania on February 20, 1996. This Court granted an extension of time to file this writ for certiorari until July 19, 1996.

This Court's jurisdiction is invoked under Title 28, U.S.C $1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VIII to the United States Constitution is set forth in Appendix B.

Amendment XIV to the United States Constitution is set forth in Appendix C.

Amendment V to the United States Constitution is set forth in Appendix D.

Amendment VI to the United States Constitution is set forth in Appendix E.

STATEMENT OF THE CASE

Petitioner is the owner of a multi-unit, residential, low-income housing apartment complex containing 36 units in the Borough of Kennett Square, County of Chester, Commonwealth of Pennsylvania. This case concerns the enforcement by the borough of certain housing maintenance ordinances against the Petitioner.

Petitioner purchased the apartment complex, known as "Scarlet Manor", in 1988 and since that time has been the subject and focus of a selective enforcement mission by the borough of its housing maintenance ordinance. Since 1988, the borough has issued numerous citations against Petitioner alleging violations of the local building and housing codes. On

February 17, 1993, believing that its constant enforcement of the code by the repeated issuance of citations was not effective, the borough filed a Petition in Equity in the Pennsylvania Common Pleas Court seeking a resolution of the situation. Equity relief was granted and an agent, appointed by the Pennsylvania Common Pleas Court, took control of the premises under Court Order dated December 8, 1993. (Appendix F)

The Equity Order granted the agent full control of the premises. The Petitioner was not to collect rents and was required to turn over rents already collected from the previous month and all security deposits. The Petitioner was also required to pay to the agent the sum of $7500 for the correction of future violations. The agent was given sole discretion in retaining persons to remediate the housing deficiencies. The agent was ordered to repair the existing violations, ascertain new violations and correct them, and accumulate $10,000 as a maintenance escrow fund. The agent was to compensate himself for his services at $125.00 per hour.

There are 24 alleged ordinance violations which form the subject matter of this writ. All of these violations were issued in March of 1993, several months before the equity proceedings, and were considered along with other violations when the Court granted equity relief to the borough. Subsequent to the court appointed agent taking control of the premises in December of 1993, the borough proceeded with a criminal action against the petitioner in April of 1994, seeking fines upon the 24 ordinance violations.

The violations will be detailed below, but for now, the Court should be aware of the de minimis nature of most of the violations. They include a dripping faucet, the lack of kitchen drawers, the lack of a locking mechanism to hold a window in the upright position, a missing bathroom door knob, the lack of kitchen cabinet drawers

again, an inoperable burner on an electric stove (1 of 4 burners) which posed no safety threat, rubbish in a utility room which rubbish was construction materials such as door frames which were being stored there. Each violation carried a possible fine of $300 to $1000. The Petitioner was found guilty of all violations and fined the sum of $14,550.

Petitioner took appeal of this sentence to the Commonwealth Court of Pennsylvania alleging, inter alia, excessive fines, double jeopardy and oppressive enforcement of the borough's code. The Commonwealth Court's opinion reveals a reluctance to address these important issues in this particular case. The Court repeatedly refers to and cites an earlier Commonwealth Court Opinion concerning a separate appeal on other facts. While the facts forming the subject matter of the earlier opinion concern the Petitioner, they are not the facts of the current case at bar.

The Commonwealth Court did not address Petitioner's primary contention of oppressive enforcement. Petitioner contended that the violations upon which he was sentenced (missing doorknob, missing drawers, etc) were de minimis in nature and not related to the health and safety of the community. The local building and housing ordinance is enacted and enforced under the government's police power. A government's police power can only be used to protect the health and safety of the public. If a government body uses the police power in a manner which does not directly protect the public's **health** or **safety**, it is considered oppressive and violates the Fourteenth Amendment to the United States Constitution. The Commonwealth Court did not address this primary contention. It did not examine the particular violations complained of in **this case**.

Instead, the Commonwealth Court seemed to

examine these violations in the broader context of the continuing enforcement actions by the borough against the Petitioner. It did not give consideration to Petitioner's contention that the borough had gone one step too far in applying its building and housing ordinance. It did not consider Petitioner's contention that the borough, after citing Petitioner for every possible violation (there were over 200) over a 5 year period and prevailing in the Pennsylvania Courts, that the borough was now taking its ordinance to an extreme which went beyond the protection of health and safety.

Because the Commonwealth Court did not consider this fundamental contention, its decision on the excessiveness of the fines is inherently flawed. The Commonwealth Court again referred to the earlier opinion of the Commonwealth Court and did not address the fines as they relate to the violations in this case. The Court refers to the "entire record" and "Lal's history", but never discussed these specific 24 violations when determining the excessive fines issue.

In regard to double jeopardy, the Commonwealth Court did not address, at least not with appropriate analysis and consideration, Petitioner's contention that prosecution of these 24 violations subsequent to the Equity relief which included these violations, was contrary to principles of double jeopardy. While there is no dispute that double jeopardy does not apply to civil penalties, there is always an issue in civil proceedings, such as the one in Equity here, that a penalty labeled as civil is in actuality a criminal penalty which affords a defendant a double jeopardy defense. See case law discussed below.

Plaintiff contended before the Commonwealth Court that the prior Equitable relief granted to the Borough created a double jeopardy issue in regard to the subsequent prosecution of the 24 violations forming the subject matter of this case. The Commonwealth Court did

not address this issue and simply wrote in its opinion that the contention was wholly frivolous.

In regard to the right to counsel, Petitioner contended that his 6th Amendment right to counsel was violated when the criminal prosecution in this matter proceeded against him when he was not represented by counsel and his request for continuance to obtain counsel was denied. Petitioner asserted that he was willing to pay for counsel but that he was unable to find counsel willing to represent him due to his reputation in the community.

Petitioner asserted that his reputation was one which could be characterized as one who was in strong disfavor with the Common Pleas Court because of the repeated litigation concerning the Petitioner before said court. Petitioner asserted that he had contacted numerous attorneys and even provided the Trial Court with their names, but all refused to represent him because they were unwilling to jeopardize their relationship with the Court.

Petitioner also asserted that this reputation in the community was due in part to the publicity surrounding the Petitioner which publicity was created and roused by the prosecuting Borough.

The Commonwealth Court found that Petitioner was not entitled to counsel because the violations being prosecuted were summary violations and Petitioner could not have been sentenced to prison. The Commonwealth Court was following Commonwealth v. Thomas, 510 Pa. 106, 507 A.2d 57 (1986) which follows the reasoning in Scott v. Illinois, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979) which holds that the protections of the Sixth and Fourteenth Amendments only provide that no indigent criminal defendant can be sentenced to prison without assistance of appointed counsel.

Petitioner contends that Scott v. Illinois, supra,

does not apply to him as he was not an indigent defendant either requesting or in need of appointed counsel. Petitioner contends that Scott v. Illinois, supra, is over-broad and requests this Honorable Court to examine whether this case stands for the proposition that no criminal defendant is ever entitled to counsel unless they are indigent and facing possible imprisonment or whether it more properly stands for the proposition that "indigent" criminal defendants are not entitled to "appointed" counsel unless they are facing possible imprisonment.

In regard to Fourteenth Amendment due process and equal protection, Petitioner contended that his right to due process and equal protection was violated by the criminal prosecution because the Borough had previously sought and obtained equitable relief for the same violations. The well established law in the Commonwealth of Pennsylvania is that equitable and legal remedy cannot be taken at the same time.

Finally, the Commonwealth Court (opinion Appendix A) found Petitioner's appeal to be wholly frivolous and awarded the borough, sua sponte, counsel fees. On remand to the Common Pleas Court for a determination of attorney's fees, the Common Pleas Court awarded $11,955.62 in attorney's fees to the Borough.

The Supreme Court of Pennsylvania denied petitions to review the sentencing in this matter, the double jeopardy concerns and the other issues directly related to the criminal hearing in this matter on December 20, 1995 and again on February 20, 1996 (Appendix G).

Pending in the Commonwealth Court of Pennsylvania is an appeal by the Petitioner regarding the award of counsel fees. As of the filing of this writ, July 19, 1996, the **Common Pleas Equity Order is still in effect. The court appointed agent has been in full control of the premises for 32 months**. The Common Pleas Court

has modified the Equity Order on several occasions. One modification orders the Petitioner, under threat of contempt and criminal trespass, not to place his physical body on the premises at any time. A second modification directs the court appointed agent not to pay the mortgage payments due on the premises. Other modifications have directed the agent not to pay utility bills nor pay real estate taxes.

Petitioner has filed a Complaint at No. 95-7938 in Federal District Court in the Eastern District of Pennsylvania alleging, inter alia, taking of property without compensation in violation of the 5th Amendment to the United States Constitution, racial discrimination (Petitioner is of Indian ethnic origin), and RICO violations. The case is now on appeal in C.A.3, PA #96-1772.

REASONS FOR GRANTING THE WRIT

A. 14th Amendment Violation of Due Process / Oppressive Use of Police Power

Certiorari should be granted for several reasons. First, the borough's building and housing ordinance as applied in this case is an unreasonable and oppressive use of the borough's police power in violation of the Fourteenth Amendment to the United States Constitution.

It is well settled that the possession and enjoyment of all private rights are subject to a reasonable exercise of municipal police power essential to the safety, health, peace, good order, and morals of the community. By way of limitation, however, municipal police power and municipal ordinances affecting personal rights must be a reasonable regulation, designed and enforced in good faith to accomplish the general public good for which its adoption is authorized. Thus, a municipal corporation cannot interfere with the personal liberty or property of a citizen unless the restraint is necessary to promote the public health, safety and welfare. Municipal ordinances

which are oppressive on their face or in their enforcement while attempting to further the public's welfare are unconstitutional in violation of the Fourteenth Amendment. In some instances, to justify interference with beneficial enjoyment of property under its police powers, a municipality must establish that it has acted in dire necessity and that its action is reasonably calculated to alleviate or prevent a crisis condition. (See 56 Am Jur 2d, Municipal Corporations $361 et seq.; 16 Am. Jur. 2d., Constitutional Law $$278-280; 16A CJS, Constitutional Law $671; Lawton v. Steele, 152 US 133, 38 L.Ed. 385, 14 S.Ct. 499; Burlington v. Jay Lee, Inc., 130 Vt 212, 290 A.2d., 53 ALR 3d. 936 (1972); Pepper Pike v. Landskroner, 53 Ohio App.2d. 63, 7 Ohio Ops. 3d. 44, 371 NE 2d. 579, 95 ALR 3d. 364 (1977); Belle Harbor Realty Corp. v. Kerr, 35 NY 2d. 507, 364 NYS 2d. 160, 323 NE 2d. 697)

The record in this matter is replete with examples of minimal violations of the Borough's building Code. With very few exceptions these violations did not pose threats to any of the interests of the tenants or of the general public intended to be protected by the borough ordinance.

The Petitioner was convicted of the following building and housing violations, was fined and assessed costs of prosecution. There are several citations to the Notes of Testimony of the trial on April 29, 1994 and the sentencing hearing on June 7, 1994:

Citation No.	Offense	Fine
383279	dripping faucet	300.00
383276	lack of kitchen drawers	1,000.00
383266	lack of kitchen drawers	1,000.00
383258	lack of a locking mechanism to hold a window	1,000.00
383263	missing bathroom door knob	500.00

383280	hole in bathroom door	300.00
383278	inoperable burner on an electric stove (1 of 4 burners) which posed no safety threat, only an inconvenience (see NT 04/29/94 p.55 line 7)	300.00
383284	rubbish in a utility room (was construction materials such as door frames which were being stored there) (see NT 04/29/94 p.71 line 1)	500.00
383275	inoperable light fixture above bathroom sink	1,000.00
383285	boarded window in laundry room (borough contended the window needed to be replaced and Petitioner contended that the window was repeatedly broken so he boarded it. NT 04/29/94 p.57 line 24)	300.00
383265	water stain and peeling paint in ceiling	500.00
383267	missing electrical outlet cover	300.00
383271	missing electrical heating switch cover (while these may seem serious because of the electrical nature, the trial judge viewed these as de minimis and said that certainly the tenant could have spent 79 cents to replace the covers. see NT 06/07/94 p.143 line 20)	300.00
383277	cracked window glazing in kitchen (posed no physical threat of cutting, but was not weather tight/ There was no	300.00

	indication or testimony as to how much the weather could invade the apartment/ see NT 04/29/94 p.54 line 13-24)	
383261	missing light bulbs in common stairway (Petitioner contended that the tenants regularly stole the light bulbs NT 04/29/94 p.35 line 1-2 and NT 06/07/94 p.136 line 7)	300.00
383287	missing light bulbs in common stairway missing light cover	300.00
383270	missing light bulbs in common stairway	300.00

The following violations are perhaps more serious.

383288	rubbish in parking lot	1,000.00
383286	rubbish in stairway	1,000.00
383259	broken lock on window	300.00
383272	broken lock on balcony sliding door	1,000.00
383262	hole in ceiling	1,000.00
383274	hole in ceiling	700.00
383282	deteriorated ceiling	750.00

Shouldn't items which did have annoyance potential to tenants be considered landlord-tenant problems which should be solved without the intervention of the borough. Tenants have remedies under the law of Pennsylvania. See, for example, 21 Pennsylvania Law

Encyclopedia, "landlord and Tenant", Sec. 212, p.605 discussing the landlord's implied covenant that the leased premises are tenantable. The common law of Pennsylvania grants an implied warranty of habitability to tenants. Pugh v. Holmes, 486 Pa. 2172, 405 A.2d 897 (1979). Tenants' remedies for breach of this warranty are discussed at Friedman, Pennsylvania Landlord Tenant Law and Practice, Sec. 3.6(b), pp. 285-98 (1988). Tenants' remedies include, without limitation, (1) termination of the lease agreement, (2) repair by self-help and deduction of the cost of repair from rental payments and (3) an action at law for damages.

Importantly, the issues of constitutionality and reasonableness of municipal ordinances are discussed in McQuillen, Municipal Corporations. At 7A McQuillen, Municipal Corporations, se. 24.563.05 (1994 Cum. Supp.) the author states:

> "The police power of municipalities as it relates to the regulation of housing is constrained by the need to provide adequate low- and moderate-income housing in a manner that sufficiently advances the general welfare of a community." [Citing Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 92 N.J. 158, 456 A.2d 390 (1983) and Bi-County Development Corp v. Mayor & Council of Borough of Oakland, 224 N.J. Super. 455, 540 A.2d 927 (1988)].

It has been authoritatively stated that the principle is well established that exercise of the authority of the Commonwealth or its subdivisions is justified only if required by the public interest. The means must be

reasonably necessary to accomplish the intended purpose and must not be unduly oppressive upon individuals. Holland Enterprises, Inc. v. Joka, 64 Pa. Cmwlth. 129, 439 A.2d 876 (1982) wherein an ordinance was declared invalid which in effect required the developer to be the insurer of the proper functioning of a sewage disposal system and to pay for its malfunctioning even if the problem were cause by natural catastrophe or the intentional or negligent acts of the user. In City of St. Louis v. Brune, 515 S.W.2d 471, 79 A.L.R.3d 701 (Mo. 1974) the court observed that the absence of bathtubs or showers was simply a matter of inconvenience to tenants who chose to pay a reduced rent rather than a problem of public health which was not seriously threatened. In Dente v. Mt. Vernon, 50 Misc. 2d 983, 272 N.Y.S.2d 65 (1966) the court held an ordinance requiring installation of a bathtub or shower and a wash basin was unconstitutionally applied to a building containing eleven rental units where the cost of installation was prohibitive and the existing facilities were adequate for health purposes. The court held the ordinance as applied constituted an unconstitutional confiscation of the property of the apartment owner because of the cost of making the required improvements.

Also, in Adams v. City of New Kensington, 357 Pa. 557, 55 A.2d 392, 395-6 (1947), the Pennsylvania Supreme Court said that any restriction imposed by a municipal ordinance validly enacted in the exercise of the police power must be "reasonably conducive to the safety, health, morals or general welfare of the public, for the exercise of police power is always subject to judicial review and a law based upon it must not be patently beyond the necessities of the case but must bear some reasonable relation to the end attained."

The Building and Housing Ordinance of the Borough of Kennett Square as applied in this case should

be found unconstitutional. The ordinance should be interpreted so as not to encompass within the scope of violation conditions thereunder which do not pose any threat to the health, safety, morals or welfare of the public, but are simply landlord-tenant problems. In addition, it should not be interpreted to require remedying conditions which are not able to be remedied because of the lack of cooperation of tenants. The ordinance as applied in this case is unconstitutionally oppressive and became an instrument of disparate and selective enforcement.

B. 8th Amendment Excessive Fines

The second reason why this Court should grant certiorari is the fines imposed in this case are excessive in violation of the Eighth Amendment to the Constitution. The sums of money demanded by the court are extreme considering the de minimis nature of the violations.

Not only are the amounts excessive on their face for the prosecuted violations, but they are incredibly excessive when one considers the prior equitable relief already granted to the borough on the same violations.

As stated in the Statement of the Case, in the February of 1993, months before this criminal prosecution for 24 of the violations, believing that its constant enforcement of the code by the repeated issuance of citations was not effective, the borough filed a Petition in Equity in the Pennsylvania Common Pleas Court seeking a resolution of the situation. Equity relief was granted and an agent, appointed by the Pennsylvania Common Pleas Court, took control of the premises under Court Order dated December 8, 1993. (Appendix F)

The Equity Order granted the agent full control of the premises. The Petitioner was not to collect rents and was required to turn over rents already collected from the

previous month and all security deposits. The Petitioner was also required to pay to the agent the sum of $7500 for the correction of future violations. The agent was given sole discretion in retaining persons to remediate the housing deficiencies. The agent was ordered to repair the existing violations, ascertain new violations and correct them, and accumulate $10,000 as a maintenance escrow fund for future violations. The agent was to compensate himself for his services at $125.00 per hour.

In Austin v. United States, (1993, U.S.) 125 L.Ed.2d 488, 113 S.Ct. 2801, 93 CDOS 4820, 93 Daily Journal DAR 8138, 7 FLW Fed.S. 572, this Court held that the prohibition against Excessive Fines contained in the Eighth Amendment to the United States Constitution applies to civil as well as criminal penalties. This Honorable Court stated in Austin v. United States, "the Eighth Amendment's text is not expressly limited to criminal cases, and its history does not require such a limitation. Rather, the crucial question is whether the forfeiture is monetary punishment, with which the Excessive Fines Clause is particularly concerned. Because sanctions serve more than one purpose, the fact that a forfeiture serves remedial goals will not exclude it from the Clause's purview, so long as it can only be explained as serving **in part** to punish." (Id at 125 L.Ed.2d 493) See also United States v. Halper, 490 US 435, 448 L.Ed.2d 487, 109 S.Ct. 1892; Department of Revenue v. Kurth Ranch, (US) 128 L.Ed.2d 767, 114 S.Ct. 1937 (holding that civil forfeiture may violate the proscription of the Eighth Amendment against excessive fines).

While the Borough's Equity action was labeled as civil, the monetary penalties and forfeitures imposed by the Equity Order should be considered in conjunction with the monetary fines imposed by the criminal action when making a determination of excessiveness under the

Eighth Amendment. Both the Equity action and the criminal action included the 24 violations forming the subject matter of this case. While the Equity Order serves as a remedial solution to the housing violations, it also serves in part to inflict monetary penalties on the Petitioner and to punish him. Petitioner forfeits all rents, was required to pay $7,500 to the court appointed agent, the agent is compensated at $125 per hour from the rents collected which would otherwise belong to Petitioner and the court appointed agent is directed to accumulate $10,000 in an escrow fund for future violations. Such a fund for "future violations" is in no way remedial of the problems complained of by the Borough when it brought the Equity Petition. This, if not all of the monetary provisions of the order, is punitive by its very nature.

A second issue to consider in determining the excessiveness of the fines exacted in this case is the award of attorney's fees of more than $11,000. While this award was initiated sua sponte by the Commonwealth Court, clearly as a **penalty** for appealing the criminal action, it still relates back to the underlying violations. These attorney fees must be considered together with the $14,500 of fines when making a determination of excessiveness under the Eighth Amendment. There is an interconnection between the award of attorney's fees and the fines imposed which cannot be denied and must be considered. Furthermore, since the fees were awarded sua sponte by the Commonwealth Court in its opinion forming the basis of this writ for certiorari, the excessiveness of these fees, in and of themselves, should be considered by this Court.

C. Double Jeopardy

A third reason why this Court should grant certiorari is the Double Jeopardy which the Petitioner was subjected to by the prosecution of these 24 municipal

housing violations after the Petitioner was subjected to the relief granted to the Borough in Equity.

There is no question that the Double jeopardy provisions of the United States and Pennsylvania constitutions permit imposition of both criminal and civil penalties for the same act or course of conduct. However, **a question arises as to the nature of the relief granted under the Equity Order.**

This Court held in United States v. Ward, 448 U.S. 242, 100 S.Ct. 2636, 64 L.Ed.2d 742 (1980) that where a statutory scheme is "so punitive either in purpose or effect as to negate" the civil label, it is deemed criminal for purposes of the constitutional protections. See Also Kennedy v. Mendoza-Martin, 372 U.S. 144, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963)(forfeiture of citizenship for leaving the United States to evade military service); Trop v. Dulles, 356 U.S. 86, 78 S.Ct. 590, 2 L.Ed.2d 596 (1958)(stripping of United States Citizenship upon court martial for desertion in wartime); United States v. United States Coin & Currency, 401 U.S. 715, 91 S.Ct. 1041, 28 L.Ed.2d 434 (1971); One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 85 S.Ct. 1246, 14 L.Ed.2d 170 (1965) (certain penalties treated as quasi-criminal for purposes of the constitutional protections against self-incrimination and unreasonable search and seizure).

Mendoza-Martin, 372 U.S. at 168, 83 S.Ct. at 567, sets forth some of the factors that are helpful in determining whether a sanction is civil or criminal:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment-retribution and deterrence, whether the behavior to which it applies is

> already a crime, whether an alternative purpose to which it may rationally be connected is assigned for it, and whether it appears excessive in relation to the alternative purpose assigned.

In a 1995 case, the United States District Court for the Eastern District of Pennsylvania ruled that a civil sanction, such as a forfeiture, which goes beyond remedial purpose and can only be explained as also serving retributive or deterrent purpose will be considered punishment for double jeopardy purposes. The Court further held that the determination whether a civil sanction is actually punitive for double jeopardy purposes, requires particularized assessment of the penalty imposed and the purposes the penalty may fairly be said to serve. United States v. Ogbuehi, 897 F.Supp. 887 (1995).

To determine if the protection against Double Jeopardy has been violated by the subsequent prosecution of 24 of the ordinance violations which also formed the subject matter of the Borough's petition in Equity, the Court must examine in detail the equitable remedy granted to the Borough to determine if it is in any part, punitive in nature so as to serve a retributive or deterrent effect. Only if the equitable relief granted is wholly remedial in nature should such relief be considered civil in nature and not to be considered in a double jeopardy analysis.

Petitioner contends, that the Common Pleas Court, when it granted the Borough's Equity Petition, that the relief granted was not wholly remedial in nature but was also retributive, imposed affirmative restraints, was punitive and intended to deter. For instance, Petitioner

complained to the Common Pleas Court on more than one occasion that the $125 hourly rate granted to the court appointed agent as compensation was extreme. Petitioner complained that a competent property manager could be retained for an hourly rate much less than $125. The Court, over Petitioner's objections, appointed a local attorney who was authorized to bill at their regular attorney rate of $125 per hour. This is punitive.

The Equity Order directed the agent to accumulate $10,000 for future violations. This was punitive as well as intended to deter. It is in no way remedial for the violations complained of in the Equity Petition as these sums were for "future" violations.

The Petitioner was prohibited from participating in any manner in either the management of the premises or in their remediation. This is punitive as well as an affirmative restraint.

The Petitioner was ordered to pay $7,500 to the agent. While this is for remedial purposes, it is also, in part, punitive in nature.

As of the filing of this writ, July 19, 1996, the court appointed agent is still in full control of the premises some 32 months since the Equity Order of December 8, 1993. This Equitable relief is beyond that necessary to remediate the original violations complained of in the Equity Petition and clearly shows the intention of the trial judge to not only remediate, but to punish as well.

After the Pennsylvania Supreme Court's denial of Petitioner's Allocaatur Petition in equity matter, in February of 1995, the trial Court, under threat of contempt and criminal trespass, ordered the Petitioner not to place his physical body upon the premises. This is an affirmative restraint.

Also, subsequent to the Pennsylvania Supreme Court's denial to reconsider Petitioner's petition, the Common Pleas Court directed the court appointed agent

to stop paying the Petitioner's mortgage on the premises from the rents collected.

Even though these events occurred subsequent to the Borough's criminal prosecution forming the subject of this case, they are still part of the original equity action and as such must be considered in determining if the Borough's criminal prosecution was a double jeopardy after the Petitioner was made to suffer from the directives under the Court's grant of Equitable relief.

D. 6th Amendment Right to Counsel

A Fourth reason why this Court should grant certiorari is the denial of Petitioner's Sixth Amendment right to counsel by the Trial Court. Gideon v. Wainright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) extended the Sixth Amendment right to counsel to the States through the Fourteenth Amendment.

In Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708 (1980), it was held that the right under the Sixth Amendment to counsel which was made applicable to the States through the Fourteenth Amendment applied as much to counsel retained by the defendant as to counsel appointed by the State.

A defendant must be given a fair opportunity to secure counsel of his own choice Crooker v. State of California, 357 U.S. 439, 78 S.Ct. 1287 (1958). It has been held that a trial court's action in denying a continuance in order for a defendant to obtain counsel of his choice must be fair and reasonable. U.S. v. Kelm, 827 F.2d 1319 (9th Cir. 1987). In U.S. v. Rankin, 779 F.2d 956 (3d Cir. 1986) the Court recognized that the granting of a continuance is within the discretion of the trial judge, but said that a rigid insistence on expedition in the face of a justifiable request for delay can amount to a constitutional violation.

On appeal to the Commonwealth Court of Pennsylvania, Petitioner contended that he was not given an adequate and reasonable amount of time to obtain counsel. The Commonwealth Court did not address this issue and simply ruled that it was irrelevant because Petitioner was not entitled to counsel under Commonwealth v. Thomas, 510 Pa. 106, 507 A.2d 57 (1986) which follows the reasoning in Scott v. Illinois, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979) which holds that the protections of the Sixth and Fourteenth Amendments only provide that no indigent criminal defendant can be sentenced to prison without assistance of appointed counsel.

Petitioner contends that Scott v. Illinois, supra, does not apply to him as he was not an indigent defendant either requesting or in need of appointed counsel. Petitioner contends that Scott v. Illinois, supra, is over-broad and requests this Honorable Court to examine whether this case stands for the proposition that no criminal defendant is ever entitled to counsel unless they are indigent and facing possible imprisonment or whether it more properly stands for the proposition that "indigent" criminal defendants are not entitled to "appointed" counsel unless they are facing possible imprisonment.

It should be noted that the trial judge did allow Petitioner two months to obtain counsel, but Petitioner asserts that this was not sufficient time because no local attorneys were willing to represent him due to his reputation in the community.

Petitioner asserted that his reputation was one which could be characterized as one who was in strong disfavor with the Common Pleas Court because of the repeated litigation concerning the Petitioner before said court. Petitioner asserted that he had contacted numerous attorneys and even provided the Trial Court with their names, but all refused to represent him

because they were unwilling to jeopardize their relationship with the Court.

Petitioner also asserted that this reputation in the community was due in part to the publicity surrounding the Petitioner which publicity was created and roused by the prosecuting Borough.

E. 14th Amendment Due Process and Equal Protection / Election of Remedies Doctrine

A fifth reason why this Court should grant certiorari is that the criminal prosecution forming the subject of this case violated Petitioner's Fourteenth Amendment right to Due Process and Equal Protection. The law in the Commonwealth of Pennsylvania is that equitable and legal actions and remedies cannot be pursued or taken at the same time. Myshko v. Galanti, 453 Pa. 412, 309 A.2d 729 (1973).

The Common Pleas Court had already taken Equity Jurisdiction of these violations upon the basis that the legal remedy of criminal prosecution of the Petitioner was not an adequate remedy. Petitioner contends that once the Borough sought Equity relief on the basis of inadequate legal remedies and equitable relief was granted, the Borough is then subsequently prohibited from pursuing the legal remedies. Relevant cases are Tudor Development Group, Inc. v. U.S. Fidelity & Guaranty Co., 968 F.2d 357 (3d Cir. 1992); Tulio v. Com., State Horse Racing Commission, 79 Pa.Cmwlth. 705, 470 A.2d 645 (1984); Chartiers Valley Sch. Dist. v. Virginia Mansions Apartments, 340 Pa. Super. 285, 489 A.2d 1381 (1985); Trachtenburg v. Sibarco Stations Inc., 477 Pa. 517, 384 A.2d 1209 (1978).

By subjecting the Petitioner to both equitable and legal actions, the Trial Court violated a Pennsylvania doctrine and thereby violated Petitioner's Constitutional rights to Due Process and Equal Protection.

CONCLUSION

For the reasons outlined above, the petition for the writ of certiorari should be granted or, in the alternative, Petitioner prays that this Court summarily reverse the state court judgment thereby dismissing all charges, fines and attorney's fees.

Respectfully Submitted,

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Michael B. Yulsman,
Attorney for Petitioner

APPENDIX A

Borough of Kennett Square v. Lal,
665 A.2d 15 (Pa.Cmwlth. 1995)

BOROUGH OF KENNETT SQUARE

v.

Amrit LAL, Appellant.

Commonwealth of Pennsylvania.

Submitted on Briefs May 9, 1995.

Decided Aug. 11, 1995.

Reargument Denied Sept. 13, 1995.

Borough issued citations against building owner for violations of maintenance building code. The Court of Common Pleas, Chester Conty, No. 3096 through 3119-93, Gavin, J., found building owner guilty on citations and imposed fine, and appeal was taken. The Commonwealth Cout, No. 2565 C.D. 1994, Smith, J., held that: (1) doctrine of election of remedies did not bar citation proceedings; (2) no Sixth Amendent rights attached to proceedings connected with building code violations; and (3) appeal was frivolous and warranted remand for sanctions.

-Affirmed and remanded.

1. Municipal Corporations -633(1)
   Fact that borough proceeded in equity for injunctive

relief against property owner who was in alleged violation of building codes and for appointment of agent to manage property did not preclude filing of summary offenses against owner for violation of ordinance, which was punishable by fine.

2. Double Jeopardy -23

Because Fifth Amendment double jeopardy clause prohibits second criminal punishment for same criminal offense, double jeopardy would not attach where city proceeded in equity to secure appointment of agent to manage owner's property while initiating summary citation proceeding for violation of building ordinance. U.S.C.A. Const. Amend. 5.

3. Criminal Law -641.2(4)

Contention that imprisonment might result upon finding of contempt for failure of property owner to pay city fine based on violation of building ordinance did not mean that Sixth Amendment rights to counsel attached, as any possibility of imprisonment would result not from violation of building code but from separate and distinct act of contempt on owner's part. U.S.C.A. Const. Amend. 6.

4. Costs -260(5)

Appeal by building owner from citations issued for violations of building code was wholly frivolous and, in light of failure of owner to heed admonitions and efforts to end abuses of judicial process, remand for sanctions was warranted.

Thomas A. Pitt, Jr., for appellant.

John L. Hall, for appellee.

Before McGINLEY and SMITH, J.J., and LORD, Senior Judge.

SMITH, Judge.

Before the court is another appeal by Dr. Amrit Lal, this time from the judgment of sentence entered September 7, 1994 by Judge Thomas G. Gavin of the Court of Common Pleas of Chester County after finding Lal guilty on 24 citations issued for violations of the Maintenance Building Code of the Borough of Kennett Square, Ordinance No. 731 (Building Code) and imposing a fine of $14,550. The matter arises out of Lal's ownership of an apartment complex known as Scarlet Manor Apartments, located in the Borough of Kennett Square, Chester County, and consisting of two separate buildings with a total of 36 units. The violations ranged from leaking plumbing, broken or missing windows, ceiling holes, electrical problems, inoperable lighting, fire protection problems, and exterior and interior door problems.

Lal stated in his "Designation of Contents of Reproduced Record and Statement of Issues Pursuant to Rule 2154 of the Pa.R.A.P." that the issues presented for review are whether Lal was proven guilty of the summary offenses charged beyond a reasonable doubt and whether the evidence was sufficient to sustain a conviction. Lal nonetheless raised five issues in his brief, and the Borough objects to this Court's consideration of those issues because they were not properly raised in post-trial motions and are therefore waived. However, because of the nature of this matter, the following discussion is warranted.

I

Issue No. 1: Lal claims that the doctrine of election of remedies operates to bar the instant citation proceedings because the Borough filed an action for injunctive and other relief against Lal in another proceeding to secure equitable enforcement of the Borough's Building Code.[1] Further, the Borough's failure to observe the election of remedies doctrine results in double punishment of Lal for the same offense, thus violating his rights against double jeopardy.

Issue No. 2: Lal claims that the trial judge should not have proceeded to trial without counsel of Lal's choice, in violation of his Sixth Amendment rights under the United States Constitution. Lal challenges Judge Gavin's refusal to grant a third continuance of the July 1993 hearing before the court to permit Lal a fair opportunity to secure representation after prior counsel withdrew his appearance. The attorney discovered that Lal raised ineffective assistance of counsel claims against the attorney in another appeal before this Court *(Borough of Kennett Square v. Lal (Kennett Square I)*, 164 Pa.Commonwealth Ct. 654, 643 A.2d 1172, *appeal denied*, 540 Pa. 586, 655 A.2d 517 (1994), without having advised the attorney. Lal maintains that since he faced imprisonment for contempt of court if he failed to pay the fines imposed, he had the right to select any counsel he wished, and because the judge required him to proceed

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[1] *See Borough of Kennett Square v. Lal (Kennett Square II).* 165 Pa. Commonwealth Ct. 573, 645 A.2d 474, *appeal denied*, 540 Pa. 613, 656 A.2d 119 (1994) (this court affirmed Judge Gavin's appointment of an agent to manage Lal's property in compliance with the local ordinance and rejected claims that the trial judge should have recused himself because of bias and that the Borough engaged in selective enforcement of the ordinance).

to hearing without counsel, his rights were violated.

Issue No. 3: Lal claims that the Building Code was not enforced in a constitutional manner because, as applied, the Building Code bore no reasonable relationship to the health, safety, morals or general welfare of the community. Lal contends that due to the minimal nature of the violations, no threat is posed to the tenants or to the general public; and because of the tenants' lack of cooperation, the Borough's failure to provide adequate police protection or the Borough's failure to remedy Lal's violations through the use of available public funds, the Ordinance cannot be saved as to its constitutionality. Lal asserts as well that because of the de minimis nature of the violations, enforcement of the Ordinance was unreasonable and the fine imposed was excessive and violative of the Excessive Fines Clause of the Eighth Amendment to the United States Constitution.

Issue No. 4: Lal claims that the Borough should not be permitted to exercise regulatory power in this case because its inaction brought about the conditions now complained of by the Borough. Lal reiterates his contention that the Borough posessed the power to undertake community development programs including urban renewal public housing, model cities programs and neighborhood development projects to remedy the violations but failed to pursue these remedies. Lal contends that state legislation affords an avenue for the Borough to remedy the violations through urban redevelopment and community development block grant laws.

Issue No. 5: Lal claims that no competent evidence was produced by the Borough to prove that the

Ordinance ever properly took effect since the Borough failed to offer the certificate of the Borough secretary under the corporate seal, citing Section 1008 of The Borough Code, Act of February 1, 1966, P.L. (1965) 1956, *as amended*, 53 P.S. - 46008. As such, an effective ordinance was never proven to sustain the convictions against Lal beyond a reasonable doubt.

The Court's scope of review of the trial court's order in this case is limited to determining whether constitutional rights were violated or whether the tiral court committed an error of law or abuse of its discretion. *Commonwealth v. Karn*, 168 Pa.Commonwealth Ct. 435, 650 A.2d 1176 (1994).

II

This Court has decided other appeals by Lal from orders of the court of common pleas requiring Lal to comply with local property maintenance codes, and in those appeals Lal raised the same or similar issues presented in his brief sub judice.[2] At least four of the

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[2] This court notes two earlier cases, among several others not cited in this opinion, involving Lal's violations of local property maintenance ordinances. In *Amrit Lal, Appellant v. Commonwealth of Pennsylvania*, (No. 400 C.D.1990, filed December 7, 1990), this Court affirmed an order entered by the Court of Common Pleas of Delaware County finding Lal guilty of violating a local property maintenance code and sentencing him to payment of a $300 fine and costs. The violations pertained to property located in the City of Chester and the record reflected that Lal was in violation of the local ordinance since at least November 1988.

In another case, *Amrit Lal, Appellant v. Douglas P. Marguriet, Manager and F. Joseph Barber, Code Enforcement Officer of the Borough of Kennett Square, et al.*, (No. 955 C.D. 1990, filed March 4, 1991), the Court affirmed the order of the Court of Common Pleas of Chester County sustaining preliminary objections in the nature of a demurrer filed to Lal's complaint in mandamus requesting the court to order the Borough to "set up" a hearing before the Housing Appeals Board and to withdraw certain criminal citations against Lal arising out of his failure to correct housing code violations on property owned in the

issues argued in Lal's brief have been previously considered by this Court and were either rejected as being without merit, frivolous, or waived for failure to properly preserve the issue for appellate review.

Here, Lal contends that the Borough is precluded from prosecuting the summary offenses because the Borough previously filed an equity action to enjoin the same conduct and to secure the appointment of an agent to manage Lal's property. In *Borough of Kennett Square v. Lal (Kennett Square II)*, 165 Pa.Commonwealth Ct. 573, 645 A.2d 474, *appeal denied*, 540 Pa. 613, 656 A.2d 119 (1994), Lal argued that the trial court had no jurisdiction to consider the equity action because there existed a constitutionally valid Borough statute that provided an exclusive administrative remedial process (summary citation) with review by the court of common pleas. The Court rejected Lal's arguments and affirmed Judge Gavin's order to appoint an agent to manage the Scarlet Manor Apartment complex, subject of the current citation proceedings. Writing for the majority, Judge Narick stated:

> The Borough Code provides that boroughs are specifically vested with the power to enforce housing ordinances by instituting appropriate actions or proceedings in law or in equity. The Borough Code, Act of February 1, 1966, P.L. (1965) 1656, *as amended*, 53 P.S. #46202(24).
>
> . . . . . .
>
> We hold that the remedies at law, the hundreds of citations for violations of the housing code

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Borough of Kennett Square. Because Lal failed to establish his lack of an adequate remedy at law for challenging the citiatons, this Court affirmed the dismissal of his action.

> received by Appellant, have been inadequate to insure their enforcement. Thus, the safety and the habitability of the premises can not be guaranteed, and the health and welfare of the tenants residing in Appellant's apartment complex is endangered. Therefore, it was perfectly appropriate for the court to provide equitable relief in the form of appointment of an agent to manage the Scarlet Manor apartments.

Id., 165 Pa.Commonwealth Ct. at 584, 645 A.2d at 479. Based upon the foregoing, Lal's election of remedies argument is totally devoid of merit.

[1, 2] The Borough may invoke its available remedies at law or in equity to abate Lal's Building Code violations. Proceeding in equity for injunctive relief and for the appointment of an agent to manage Lal's property does not preclude the filing of summary offenses against Lal for violation of the Ordinance, punishable by fine. Moreover, any contention that double jeopardy attaches because the Borough proceeded in equity to secure appointment of the agent and initiated the summary citation proceedings as well is wholly frivolous. The Fifth Amendment double jeopardy clause prohibits a *second* criminal punishment for the *same* criminal offense. *Helvering v. Mitchell*, 303 U.S. 391, 58 S.Ct. 630, 82 L.Ed. 917 (1938).

After thoroughly reviewing the law and responding to the issues determined to be properly before the Court, Judge Narick further wrote in *Kennett Square II*:

> We believe that the repetitious and frivolous nature of this appeal entitles the Borough to the award of reasonable counsel fees pursuant to Section 2503(7)

of the Judicial Code. 42 Pa.C.S. #2503(7) and Pa.R.A.P. 2744(1).

. . . . .

> Here, Appellant has so clearly abused the legal process that we now impose on Appellant, *sua sponte*, the sanction of paying reasonable counsel fees. This appeal was a result of Appellant's refusal to respond to the Borough's complaint in equity, and instead twice appealing the trial court's preliminary rulings. Then, when Appellant suffered a judgment by default, brought on by his own intentional conduct, he filed this appeal, raising numerous, frivolous issues designed to obstruct and delay the equitable relief ordered by the trial court.

Id., 165 Pa.Commonwealth Ct. at 586-587, 645 A.2d at 480-481.

[3] In responding to Lal's claim of ineffective assistance of counsel which mirrors his "violation of right to counsel" arguments in the case sub judice, this Court observed in *Kennett Square I*:

> As the guaranteed protections of the state and federal constitutions with respect to representation of counsel apply only to situations where the possibility of imprisonment exists, a court may consider a defendant's claim that he was denied effective representation only when the defendant's conviction leads to the possibility of incarceration. . . . Pursuant to Sections 3301 and 3308 of the Borough Code, Act of February 1, 1966, P.L. (1965) 1656, *as amended*, 53 P.S. #48301,48308, respectively, a violation of a borough ordinance is a summary offense, punishable

only by fine. [Footnote omitted.] As there was no chance that Lal would be imprisoned [for violation of the Borough's Building Code], this Court need not address further Lal's claim that he was denied effective assistance of counsel.

Id., 164 Pa.Commonwealth Ct. at 661, 643 A.2d at 1176. Accordingly, no Sixth Amendment rights attach to the instant case. The contention that imprisonment may result upon a finding of contempt for failure to pay a fine does not distinguish Lal's case from well-established law. Any possibility of imprisonment in that event would result not from a violation of the Building Code, but rather from a separate and distinct act of contempt on Lal's part upon a finding by the court.

Lal also argued in *Kennett Square I* that the Borough's Building Code bore no reasonable relation to the health, safety, morals or general welfare of the community and that the conditions underlying the prosecution against Lal were caused by the Borough's own inaction in securing public funds to remedy his violations through various urban renewal funding programs available to the Borough. This court refused to consider these issues since they were raised for the first time on appeal. Nonetheless, in *Amrit Lal v. Thornbury Township*, No. 872 C.D.1994, Pa.Commonwealth Ct., 653 A.2d 720 (filed January 12, 1995), Lal repeated these same arguments, and this Court responded in part:

Lal also maintains that the Township's inaction brought about the condition complained of by the Township. Suffice it to say that Lal's contention that the Township should have secured funds under Urban Redevelopment Laws, among others, to assist Lal in remedying the public nuisance has absolutely no merit

and requires no further mention.

Slip opinion at 5.[3] Incorporated into this issue is Lal's assertion that the Borough lacks regulatory power to enforce the Ordinance because the Borough failed to secure outside funding to correct Lal's violations. This bald assertion is reflective of the disdain exhibited by Lal toward the legal process and merely lends support for the final conclusion reached by this Court.

In response to Lal's attacks against the trial court's sentence as excessive, this Court stated in *Kennett Square I*:

> [T]he trial court should weigh all mitigating and aggravating factors and arrive at an appropriate sentence that is consistent with the protection of the public and the gravity of the offense. . . . Considerations should include the history and character of the defendant, the nature and circumstances of the crime. . . . Finally, if a sentence imposed is within the statutory limits, there is no abuse of discretion unless the sentence is manifestly excessive so as to inflict too severe a punishment.

Id., 164 Pa.Commonwealth Ct. at 659-660, 643 A.2d at 1175 (citations omitted). Judge Gavin reduced the maximum fine of $24,000 imposed by the district judge to $14,550 after properly considering the entire record and Lal's history. Absolutely no judicial abuse of discretion

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[3] Lal similarly failed to prevail on his claim that the Building Code bore no reasonable relationship to the health, safety and morals of the community. Lal also argued in *Kennett Square II* that the Building Code bore no reasonable relation to the health, safety and morals of the community; this issue was deemed waived for failure to properly preserve it for appellate review.

has been demonstrated by Lal in this context, nor has he otherwise shown any basis for his claims of violation of the Excessive Fines Clause of the Eighth Amendment.

Lal's fifth issue, involving the legal effect of Ordinance No. 731, is a frivolous one and needs no discussion on its merits. The Court notes, however, that Lal produced no evidence nor cited any statutes or cases to support his argument that the absence of an effective date on the face of the Ordinance caused it to be invalid. The record demonstrates that the Ordinance was adopted on May 20, 1991 and was lawfully recorded in the Borough ordinance book following its enactment as required by Section 1008 of the Borough Code, 53 P.S. #46008.

III

The Borough noted in its brief that prior to sentencing, Lal had committed over 225 maintenance housing and building code violations; and Judge Gavin noted in his opinion that Lal has been involved in more than 100 different cases before Judge Gavin alone, involving Lal's vast real estate holdings in Chester County. Tr. Ct. opinion at 4 n. 5.

Judge Gavin further commented concerning Lal's "duplicity" as evidenced by his filing of unsubstantiated recusal motions before the court; raising an ineffective assistance of counsel claim, in another appeal, against his current counsel without informing him of the pendency of that claim; raising various oral motions despite admonishment from the court that all motions must be in writing; presenting repeated frivolous requests for continuance of hearing before Judge Gavin to secure counsel; raising in post-trial motions frivolous and unsubstantiated claims; and thereafter filing a petition for summary dismissal further demonstrating Lal's

"contemptuous behavior" toward the legal process. Tr. Ct. opinion at 9.

[4] Based upon a full review of this matter, the Court concludes that Lal's appeal is wholly frivolous and further, that to uphold the integrity of this Court in specific and the judicial process in general, this matter must be remanded, sua sponte, to Judge Gavin to impose against Lal all costs, counsel fees and damages allowed by acts of the general assembly and the Pennsylvania rules of court. Lal has failed to heed the Court's earlier admonitions and efforts to end his abuse of the judicial process through repeated filings of frivolous appeals. *See Kennett Square II: Thornbury Township*. The remand to Judge Gavin for the imposition of sanctions is designed to respond directly and unequivocally to Lal's egregious conduct. The trial court's order is affirmed in all respects.

ORDER

AND NOW, this 11th day of August, 1995, the order of the Court of Common Pleas of Chester County is hereby affirmed. This case is remanded to the Court of Common Pleas for the imposition of costs, fees and damages consistent with the foregoing opinion.

Jurisdiction relinquished.

S/- D. Smith

APPENDIX B

Amendment VIII to the United States Constitution

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

APPENDIX C

Amendment XIV to the United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX D

Amendment V to the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX E

Amendment VI to the United States Constitution

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

APPENDIX F

Common Pleas Court of Pennsylvania Order December 8, 1993 granting equitable relief to the Borough of Kennett Square.

AND NOW, this 8th day of December, 1993, it is hereby ORDERED that:

1. Scott D. O'Neill, Esq. is appointed agent for defendant;
2. Scott D.O'Neill, Esq. shall immediately identify every occupant of the "Scarlett Manor" Apartments and advise same that henceforth all rental payments are to be made directly to Scott D.O'Neill, Esq. Each tenant shall receive a copy of this Order;
3. Scott D.O'Neill, Esq. shall immediately arrange with the appropriate Borough official for a unit by unit inspection of the Scarlett Manor Apartments for the purpose of ascertaining code violations and in the event violations are found, the said Scott D.O'Neill, Esq. is to remediate same within sixty days of the date of the inspection during which period the borough may not file any NEW citations relating to discovered deficiencies or prosecute existing citations;
4. Scott D.O'Neill, Esq. shall obtain proper occupancy permits for each and every unit and as to those units currently occupied without occupancy permits same shall be obtained within the same sixty day period above-referenced ;
5. Scott D.O'Neill, Esq. shall apply all rental income in the following manner:

a) To mortgage holders in the priority of their lien.
b) To operating expenses such as heat, electric, common maintenance, etc.
c) To repairs
d) To a maintenance escrow fund until same equals

$10,000
e) To defendant

6. Scott D. O'Neill, Esq. shall be compensated at the rate of $125 per hour. Attorney O'Neill shall submit monthly, to the undersigned, an itemized statement of services rendered showing the date, service and time expended.
7. Defendant shall provide Scott D.O'Neill, Esq. with copies of all leases and a tenant roll within ten days of the date of this Order;
8. Defendant shall transfer to Attorney O'Neill all security deposits and/or last month's rents obtained from tenants of the Scarlett Manor Apartments, which funds shall be disbursed by Scott D.O'Neill, Esq. when appropriate.
9. Scott D.O'Neill shall have sole discretion in retaining persons to remediate deficiencies.
10. Defendant shall transfer to Attorney O'Neill the sum of $7500 to be applied pursuant to the provisions of paragraph 5 above.*

BY THE COURT
Thomas G. Gavin

J.

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* I do this in anticipation that defendant has already received the December rents and the failure to apply same as above-indicated would frustrate the court's order and deny the borough the very relief I have just granted it. Said funds to be paid within ten days of the date of this Order.

APPENDIX G

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

AMRIT LAL, No.211 E. D.Misc.Dkt . 1995
Petitioner
v.
BOROUGH OF KENNETT SQUARE

ORDER

PER CURIAM:

AND NOW, this 20th day of December, 1995, the Petition for permission to File Allocatur Petition Nunc Pro Tunc is denied.

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

NO. 211 E.D. Misc.1995

Amrit Lal, Petitioner
v.
Borough of Kennett Square

ORDER

PER CURIAM:

AND NOW, this 20th day of February, 1996, the Motion for Reconsideration is denied.

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

AMRIT LAL, Petitioner

vs.

BOROUGH OF KENNETT SQUARE, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE COMMONWEALTH COURT
OF THE COMMONWEALTH OF PENNSYLVANIA

PROOF OF SERVICE

I, Michael B. Yulsman, Esq., do swear and declare that on this date, July 19, 1996, pursuant to Supreme Court Rules 29.3 and 29.4, I have served the attached PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first class postage prepaid.

The names and addresses of those served are as

follows:

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(Attorney for Borough of Kennett Square)

_____
Michael B. Yulsman, Affiant

Subscribed and Sworn to Before Me
this _____day of July ____1996.

_____
Notary Public in and for the
County of Montgomery and
Commonwealth of Pennsylvania

Supreme Court, U.S.
FILED
OCT 28 1996
CLERK

(2)

No. 96-475

In The

Supreme Court of the United States

October Term, 1996

AMRIT LAL,

Petitioner,

vs.

BOROUGH OF KENNETT SQUARE,

Respondent.

On Petition for a Writ of Certiorari to the Commonwealth Court of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

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37 pp

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Petitioner's failure to file a timely petition for allocatur to the Pennsylvania Supreme Court leaves your Honorable Court without jurisdiction to consider the Petition.

2. Whether the tangle of constitutional issues now raised by Petitioner, considered and rejected by the Commonwealth Court of Pennsylvania, in any way justifies a grant of certiorari.

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Respondent Borough of Kennett Square ("Respondent") respectfully requests that your Honorable Court deny the petition of Amrit Lal ("Petitioner") for a writ of certiorari to review the decision and order of the Commonwealth Court of Pennsylvania, as the petition does not arise from a final judgment or decree from the highest court of the state from which an appeal could be had, and as the petitioner presents no legitimate constitutional issues arising from the decisions below.

OPINIONS AND JUDGMENTS OF THE COURTS BELOW

The following is a list of the pertinent lower court proceedings.

I. Instant Appeal:

Borough of Kennett Square v. Lal (Kennett Square III), 665 A.2d 15 (Pa. Cmwlth. 1995) (affirming trial court decision finding Amrit Lal guilty of Borough Property Maintenance Code violations, and, due to Lal's frivolous appeal and continued abuse of judicial proceedings, remanding for imposition of costs, fees and damages against Lal), *petition for permission to file allocatur petition nunc pro tunc denied,* No. 211 E.D. Misc Docket 1995 (Pa. December 20, 1995), *motion for reconsideration denied,* No. 211 E.D. Misc Docket 1995 (Pa. February 20, 1996), *application for extension of time to file petition for writ of certiorari granted,* Application No. A-963 (U.S. May 23, 1996), *petition for writ of certiorari returned for failure to comply with court rules,* letter of William K. Suter, Clerk of Court (U.S. July 22, 1996), *petition for writ of certiorari placed on docket,* No. 96-475 (U.S. September 26, 1996).

II. Related Cases:

Borough of Kennett Square v. Lal (Kennett Square II), 645 A.2d 474 (Pa. Cmwlth. 1994) (affirming default judgment against Amrit Lal in equity action, affirming trial court's appointment of agent to manage Lal's apartment complex and correct violations, and, due to Lal's frivolous appeal designed to obstruct the equitable relief, remanding for imposition of attorney's fees against Lal), *allocatur denied*, 656 A.2d 119 (Pa. 1995).

Borough of Kennett Square v. Lal (Kennett Square I), 643 A.2d 1172 (Pa. Cmwlth. 1994) (affirming Amrit Lal's conviction for violating Borough Property Maintenance Code provisions), *allocatur denied*, 655 A.2d 517 (Pa. 1994).

Amrit Lal v. Borough of Kennett Square, Kenneth Roberts, as President of the Borough Council, Council Members J. McCarthy, C. Merrick, M. Piergalline, J. Scalise and T. Zunino, Mayor C.S. Cramer, Douglas Marguriet, Borough Manager, Charles Warner, Code Enforcement Official, Albert McCarthy, Chief of Borough Police, John L. Hall, Associate Solicitor, Mark Tunnell, Assistant Solicitor and John Halsted, Solicitor to the Borough, Government of Chester County, Commissioners Joe Kenna, A. Dinneman and K. Martynick, Marita Hutchinson, Property Manager and Agent for Hon. Thomas G. Gavin and Joseph R. Pitts, Legislative Representative from Kennett Square, in their official and individual capacities, No. 95-7938, (U.S. Dist. Ct., E.D. Pa. July 25, 1996) (Ditter, J., dismissing Amrit Lal's civil rights, RICO and state law-based claims, and imposing sanctions as "Lal's complaint was filed for the improper purpose of harassing the defendants, and is not warranted by existing law or a nonfrivolous argument for its extension or reversal." Slip. op. at 3), *appeal filed*, No. 96-1772 (3d Cir. October 1, 1996), *motion for stay of enforcement*

of sanctions and attorneys' fees denied, No. 96-1772 (3d Cir. October 21, 1996).

COUNTERSTATEMENT OF JURISDICTION

Although Petitioner alleges jurisdiction pursuant to Title 28, Section 1257(a) of the United States Code, 28 U.S.C.S. § 1257(a) (Law. Co-op. 1988 & Supp. 1996), your Honorable Court is without jurisdiction to hear this case. Following the August 11, 1995 issuance of the decision and order of the intermediate appellate court, *Borough of Kennett Square v. Lal (Kennett Square III)*, 665 A.2d 15 (Pa. Cmwlth. 1995), and the September 13, 1995 denial of reargument, the Petitioner failed to file a timely petition for allocatur to the Pennsylvania Supreme Court. The instant petition for certiorari therefore does not arise from a final judgment or decree from the highest court of the state from which an appeal could be had.

COUNTERSTATEMENT OF CASE

I. Case History

The Petitioner, Dr. Amrit Lal, Ph.D., J.D., (N.T. 6/6/94, p. 18; 6/7/94, p. 134, 148)[1], is the owner of an apartment complex known as Scarlett Manor Apartments, situated in the Borough of Kennett Square, Pennsylvania. The Borough is the instant respondent. This complex consists of two separate buildings containing 18 apartments in each building for a total of 36 units. (N.T. 6/6/94, p. 29). The complex's severe state of disrepair resulted in earlier cases upholding the Respondent's right to enforce its property maintenance ordinance, *Borough of Kennett Square v. Lal (Kennett Square I)*, 643 A.2d 1172 (Pa.

1. "N.T." indicates transcripts of trial court proceedings in the Court of Common Pleas of Chester County, Pennsylvania before the Honorable Thomas G. Gavin.

Cmwlth. 1994), *allocatur denied*, 655 A.2d 517 (Pa. 1994), and approving of the appointment of an agent to ensure adequate maintenance of the property. *Borough of Kennett Square v. Lal (Kennett Square II)*, 645 A.2d 474 (Pa. Cmwlth. 1994), *allocatur denied*, 656 A.2d 119 (Pa. 1995).

The current case developed on or about August 31, 1992 when the Borough Code Enforcement Officer and Manager, Douglas Marguriet, (N.T. 6/6/94, pp. 21-22) inspected the complex and subsequently prepared and mailed a notice of violation letter dated September 24, 1992. The September 24, 1992 letter was six pages in length and described numerous violations throughout the apartment complex. (N.T. 6/6/94, p. 30).

Following a re-inspection conducted on December 23, 1992, Mr. Marguriet sent Petitioner a second notice of violation letter dated December 30, 1992, notifying him of further property maintenance code violations. (N.T. 6/6/94, pp. 30-31). Instead of making the necessary repairs, Petitioner filed an internal appeal to the Borough of Kennett Square Building and Fire Appeals Board which scheduled a hearing on the violations for February 16, 1993. During the hearing, Mr. Marguriet testified and presented photographic evidence supporting the violations. (N.T. 6/6/94, pp. 31-32). On February 22, 1993, the Building and Fire Appeals Board issued an opinion finding the evidence of violations overwhelming and, by order, dismissed and denied Petitioner's appeal. (N.T. 6/6/94, pp. 77-78).

The issuance of the Building and Fire Appeals Board's Opinion and Order was followed by a re-inspection on March 24 and March 27, 1993. During that inspection, violations which were listed in the September 24, 1992 and December 30, 1992 notice of violation letters were found uncorrected. Consequently, the twenty-four (24) citations which are the subject of the instant appeal were issued.

The citations were consolidated for a summary trial before District Justice Martin in Kennett Square District Court 15-3-04. A summary trial was held on July 2, 1993, following which Dr. Lal was convicted and sentenced to pay the maximum fine of $1,000 for each violation. (N.T. 6/7/94, p. 113). Thereafter, Petitioner filed an appeal to the Chester County Court of Common Pleas which assigned separate case numbers to each citation, and consolidated them for trial before the Honorable Thomas G. Gavin.

Prior to trial, on March 29, 1994, Petitioner filed a "Petition for Summary Dismissal," alleging that due to the "extraordinary relief provided Kennett Borough by the Court [presumably in the final equity decree issued by Judge Gavin and reviewed by the Commonwealth Court, *Borough of Kennett Square v. Lal (Kennett Square II)*, 645 A.2d 474 (Pa. Cmwlth. 1994), *allocatur denied*, 656 A.2d 119 (Pa. 1995)], it is no longer necessary to beat a dead horse or engage in overkill." This Petition was denied by the Court on March 31, 1994, following which, on or about April 11, 1994, Petitioner began a sub-stream of litigation by filing a Petition for Review in the Commonwealth Court. By Order dated April 21, 1994, the Commonwealth Court transferred the Petition for Review to the Supreme Court of Pennsylvania.[2]

On April 13, 1994, the parties appeared before Judge Gavin for the scheduled trial *de novo*. Initially, Petitioner, through his trial attorney, R. Kerry Kalmbach, moved that Judge Gavin recuse himself. (N.T. 4/13/94, pp. 2-4). After the Court denied the recusal motion, and in response to the Court's inquiry, Petitioner confirmed that he was alleging Mr. Kalmbach's

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2. On July 7, 1994, the Pennsylvania Supreme Court denied Lal's Petition for Review. On or about July 18, 1994, Lal filed a Petition for Reconsideration in the Supreme Court. The Petition for Reconsideration was denied by the Supreme Court on August 30, 1994.

ineffectiveness in similar municipal violation cases then pending before the Commonwealth Court. *Borough of Kennett Square v. Lal (Kennett Square I)*, 643 A.2d 1172 (Pa. Cmwlth. 1994), *allocatur denied*, 655 A.2d 517 (Pa. 1994); *Thornbury Township v. Lal*, No. 872 C.D. 1994, 653 A.2d 720 (Pa. Cmwlth. January 12, 1995). Mr. Kalmbach revealed that he was not aware of Petitioner's ineffectiveness claims and promptly withdrew as counsel from the case. (N.T. 4/13/94, pp. 9-10). Thereafter, the court continued the cases until April 29, 1994 informing Petitioner that if he did not have substitute counsel at that time he must be prepared to proceed as his own counsel. (N.T. 4/13/94, pp. 10-11).

When the court reconvened on April 29, 1994, Petitioner asserted that the court lacked jurisdiction due to the pending Petition for Review. (N.T. 4/29/94, pp. 2-4). Following the court's rejection of this argument, Petitioner made a second motion for recusal. (N.T. 4/29/94, pp. 5-7). The court denied this second recusal motion. After the start of the Borough's case, Petitioner requested a continuance to acquire counsel. The court again granted Petitioner's motion continuing the matter, this time until June 6, 1994, on which date the court stated that there would be no further continuances. (N.T. 4/29/94, pp. 8-11).

On June 6, 1994, the court found that Petitioner had filed a written Petition for Recusal on June 3, 1994. Additionally, and in disregard of the Court's previous instruction to Petitioner that motions to the court must be made in writing before the trial date (N.T., 6/6/94, pp. 10, 17), Petitioner made the following oral motions: motion for continuance to seek counsel (N.T. 6/6/94, pp. 4, 18-19), motion that the court lacked jurisdiction due to the pending Petition for Review (N.T. 6/6/94, pp. 10-15), motion for dismissal due to the absence of an effective date on the municipal ordinance adopting the BOCA property

maintenance code (N.T. 6/6/94, pp. 15-16, 20-24), motion that the ordinance is unconstitutional (N.T., 6/6/94, pp. 16-17), motion that the citations constitute double jeopardy (N.T. 6/6/94, pp. 17-18). Following the denial of these motions, evidence was taken on the merits of the citations.

The trial was completed on June 7, 1994 following which the Petitioner was found guilty of all citations and immediately sentenced. The fines ordered by the court to be paid by Petitioner ranged from the minimum $300 amount to the $1,000 maximum amount. (N.T. 6/7/94, pp. 134-145).

On June 17, 1994, the Petitioner filed a Motion to Vacate the Sentences and a Request for New Trial. To ensure the Petitioner's right to allocution, and although the motion was in violation of Pa. R.Crim. P. 1410(D), the Respondent consented to a vacation of sentences which the court ordered on June 23, 1994. On July 5, 1994, Petitioner's newly hired attorney, Thomas A. Pitt, Jr., requested that the resentencing hearing be continued to permit counsel to submit a memorandum of law on the issues raised in the Motion for New Trial. This request was granted.

On August 11, 1994, oral argument was held, following which the Motion for New Trial was denied. Sentencing, however, was continued in order to give the parties an adequate opportunity to settle the matter if possible.

When the parties reconvened for sentencing on September 7, 1994, the court reimposed the sentences which it had originally imposed on June 7, 1994. At Petitioner's request, the Court granted him sixty (60) days to pay all fines and costs. (N.T. 9/7/94, pp. 17-18). On October 6, 1994, Petitioner filed a notice of appeal to the Commonwealth Court. Following the filing of the notice of appeal, Petitioner filed a motion for

supersedeas to stay the payment of fines, first to the lower court and later with the Commonwealth Court, both motions being denied by the respective courts.

The Commonwealth Court affirmed the trial court's decision in *Borough of Kennett Square v. Lal (Kennett Square III)*, 665 A.2d 15 (Pa. Cmwlth. 1995) and further remanded the case, *sua sponte*, for imposition of costs, fees and damages against the Petitioner. In doing so, the Commonwealth Court stated that "Lal has failed to heed the Court's earlier admonitions and efforts to end his abuses of the judicial process through repeated filings and frivolous appeals." 665 A.2d at 20. Such warnings were given in *Kennett Square II, supra*, and *Thornbury Township, supra*.

As further explained in the argument section of this brief, *infra*, Petitioner failed to file a timely allocatur petition before the Pennsylvania Supreme Court. Following this failure, he filed a petition for permission to file an allocatur petition *nunc pro tunc*, which was denied at No. 211 E.D. Misc. Docket 1995 (Pa. December 20, 1995), and then a motion for reconsideration which was also denied, at No. 211 E.D. Misc. Docket 1995 (Pa. February 20, 1996).

Petitioner then made an application for extension of time to file petition for writ of certiorari to your Honorable Court which was granted at Application No. A-963 (U.S. May 23, 1996). However, when he finally filed his petition, it was returned for failure to comply with court rules. Letter of William K. Suter, Clerk of Court (U.S. July 22, 1996). Following Petitioner's corrections, the petition for writ of certiorari was placed on the docket at No. 96-475 (U.S. September 26, 1996).

II. Petitioner's Misstatement of Fact.

The Petitioner's statement of the case is replete with

factual misstatements and inaccuracies. The most important of these are noted for your Honorable Court's reference.

First, Petitioner provides no citation or source for the allegation that the Respondent has engaged in a "selective enforcement mission" against the Petitioner for his myriad of housing code violations. Petition at 3. Indeed, this is because no reference is available, as the trial court received no evidence of substance concerning any supposedly discriminatory treatment. (N.T. 6/7/94, pp. 127-132). The Petitioner's apparent belief is that if he makes an allegation enough times, it will stick. The Commonwealth Court below properly recognized the repetitive and frivolous nature of the Petitioner's appeals as sanctionable, *Kennett Square III, supra,* 665 A.2d at 20, as did the same court in *Kennett Square II, supra,* 645 at 480-481. Of similar import is the recent decision of Judge Ditter of the U.S. District Court for the Eastern District of Pennsylvania, *Amrit Lal v. Borough of Kennett Square, et al.,* No. 95-7938, (U.S. Dist. Ct., E.D. Pa. July 25, 1996), *appeal filed,* No. 96-1772 (3d Cir. October 1, 1996), *motion for stay of enforcement of sanctions and attorneys' fees denied,* No. 96-1772 (3d Cir. October 21, 1996), in which the court dismissed the Petitioner's civil rights, RICO and state law-based claims, and imposed sanctions against the Petitioner because his "complaint was filed for the improper purpose of harassing the defendants, and is not warranted by existing law or a nonfrivolous argument for its extension or reversal." Slip. op. at 3).[3]

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3. The full case caption of the action before Judge Ditter evidences the Petitioner's slash-and-burn technique of litigation: *Amrit Lal v. Borough of Kennett Square, Kenneth Roberts, as President of the Borough Council, Council Members J. McCarthy, C. Merrick, M. Piergalline, J. Scalise and T. Zunino, Mayor C.S. Cramer, Douglas Marguriet, Borough Manager, Charles Warner, Code Enforcement Official, Albert McCarthy, Chief of Borough Police, John L. Hall, Associate Solicitor, Mark Tunnell, Assistant Solicitor* (Cont'd)

Similarly, Petitioner attempts to mislead your Honorable Court with the following statement:

> Petitioner took appeal of this sentence to the Commonwealth Court of Pennsylvania, alleging inter alia, excessive fines, double jeopardy, and oppressive enforcement of the borough's code.

Petition at 5. In reality, the Petitioner appealed to the Commonwealth Court only on the issues of "whether [Petitioner] was proven guilty of the summary offenses beyond a reasonable doubt and whether the evidence was sufficient to sustain a conviction." *Kennett Square III, supra,* 665 A.2d at 16. Despite the limited appeal taken, Petitioner then proceeded to raise the tangle of putative constitutional issues within his Commonwealth Court brief. The Commonwealth Court recognized Respondent's objection on the grounds of waiver, but addressed several constitutional questions "given the nature of this matter." 665 A.2d at 16. The court then denied all constitutional claims, and found the nature of the Petitioner's matter as being nothing but frivolous. *Id.* at 20.

As to the separate equity matter, suffice it say that Petitioner has distorted the foundation and import of the order appointing an agent to oversee operation of Petitioner's most notorious real estate complex. An accurate description of the facts is found at *Borough of Kennett Square v. Lal (Kennett Square II), supra,* 645 A.2d 474.

(Cont'd)

and John Halsted, Solicitor to the Borough, Government of Chester County, Commissioners Joe Kenna, A. Dinneman and K. Martynick, Marita Hutchinson, Property Manager and Agent for Hon. Thomas G. Gavin and Joseph R. Pitts, Legislative Representative from Kennett Square, in their official and individual capacities.

Petitioner's factual statement relies on the supposed *de minimis* nature of the property maintenance code violations. In fact, the trial court judge reduced the fines for the more minor violations. For instance, the judge reduced a $1000 fine to $300 in the case of broken window glass ("Again this is one of those annoying little matters that probably entail a couple of dollars worth of glass and a couple dollars worth of labor and it goes uncorrected for a period of seven months." N.T. 6/7/94, pp. 139). However, many violations were more substantial, and in those cases the judge imposed the full $1000 citation ("Exhibit B-6. . . shows a bathroom that is deplorable when one has in mind that the tenant had to endure a hole in the ceiling that based on this photograph approximated 18 inches to 24 inches by at least three feet for a period from September of '92 through March of '93. No one has to live like that. A major hazard. A fine of $1,000.00 together with the costs of prosecution." N.T. 6/7/94, pp. 137).

Finally it must also be noted that Petitioner references his federal action, *Amrit Lal v. Borough of Kennett Square, et al., supra*, without acknowledging Judge Ditter's dismissal of the case and imposition of sanctions on July 25, 1996. Petition at 9. This lack of candor to the tribunal is inexcusable as Petitioner's "corrected" petition was placed on your Honorable Court's docket on September 26, 1996, a full two months after the federal case was dismissed. Curiously, Petitioner only mentions cryptically that "the case is now on appeal." Petition at 9.

REASONS FOR DENYING THE WRIT

I.

THE PETITION DOES NOT ARISE FROM A FINAL JUDGMENT OR DECREE FROM THE HIGHEST COURT OF THE STATE FROM WHICH AN APPEAL COULD BE HAD, AND YOUR HONORABLE COURT THEREFORE HAS NO JURISDICTION.

The Petitioner has stated that his petition for writ of certiorari is brought pursuant to Title 28, Section 1257(a) of the United States Code, which provides in pertinent part that such a petition may be reviewed if it arises from "[f]inal judgments or decrees rendered by the highest court of a state in which a decision could be had." 28 U.S.C.S. § 1257(a) (Law. Co-op. 1988 & Supp. 1996). While it is generally recognized that your Honorable Court may review the judgment of an inferior state court where the state's highest court has denied appeal, *see, e.g., Interstate Circuit, Inc. v. Dallas,* 390 U.S. 676 (1968); *Clark v. Pennsylvania,* 128 U.S. 395 (1888), the Petitioner's instant request for review does not fit within the general rule, and the Petition should therefore be denied.

In the instant case, the petition arises from the opinion and order of the Commonwealth Court of Pennsylvania, one of Pennsylvania's two intermediate appellate courts. *Borough of Kennett Square v. Lal (Kennett Square III),* 665 A.2d 15 (Pa. Cmwlth. 1995) Petitioner, however, failed to file a timely petition for allocatur with the Pennsylvania Supreme Court according to the Pennsylvania Rules of Appellate Procedure. His subsequent attempts to file a petition for allocatur nunc pro tunc were then appropriately denied by the Pennsylvania Supreme Court. Petitioner's Appendix G. The result of the Petitioner's own failure to file a *timely* petition for allocatur

before Pennsylvania's highest court creates a case over which your Honorable Court has no jurisdiction. No party can claim any knowledge concerning how the Pennsylvania Supreme Court would have responded to a timely petition for allocatur, as a timely petition was never filed. The situation is analogous to cases in which your Honorable Court refused to assume that an application for review to a state's highest court would be refused, where such an application had not been filed. *See, e.g., Stratton v. Stratton,* 239 U.S. 55, 56 (1915)("[T]his simply invites us to assume jurisdiction by exercising an authority which we have not; that is, by indulging in conjecture as to what would or would not have been the judgment of the supreme court of Ohio if it had been called upon to exert the discretion vested in it by state laws."); *Fisher v. Perkins,* 122 U.S. 522, 526 (1887) ("Certainly it would not be claimed that a judgment of the [intermediate appellate] court could be reviewed by this court . . . before an application had been made in proper time for the allowance of an appeal, and the application refused for some sufficient reason"). Petitioner's failure to make a timely filing before the Supreme Court of Pennsylvania is the conceptual equivalent of no filing at all, and precludes review by your Honorable Court.

Petitioner makes the misleading claim that his appeal was untimely only because the Commonwealth Court's "[n]otice of denial of reconsideration was never sent to the pro se Petitioner." Petition, p. 3. In actuality, the Petitioner had released his counsel, and then failed to file an entry of appearance *pro se*. Under Pennsylvania Rules of Appellate Procedure, the appellate court must grant leave for previous counsel to withdraw his appearance. Pa.R.A.P. 907(b). Petitioner did not, and does not allege, that he or his counsel requested leave to withdraw counsel's appearance. As a result, the Commonwealth Court's denial of the so-called "*pro se*" motion for reconsideration was sent to the Petitioner's counsel

of record. As this counsel was no longer representing Petitioner, and indeed, had no knowledge of the motion, he simply filed it away. These facts are indicated by the affidavit procured by the Petitioner from his former counsel, attached as an exhibit to his nunc pro tunc petition before the Pennsylvania Supreme Court. Petition for Permission to File Allocatur Petition Nunc Pro Tunc, No. 211 E.D. Misc Docket 1995 (*denied*, Pa. December 20, 1995).

Petitioner certainly had knowledge of the entry of appearance requirements, as he has been recognized at trial and appellate levels as the most prolific litigator in the history of Chester County, Pennsylvania, the county from which the case springs. *Kennett Square v. Lal (Kennett Square II), supra*, 645 A.2d at 476. He is the holder of law degree, and the Commonwealth Court has previously recognized Petitioner's legal acumen, stating:

> The trial court noted that Appellant has a Ph.D. and a law degree, and the level of sophistication of his pleadings and his ability to manipulate the rules shows he was not a typical *pro se* litigator. Rather, he was more an unlicensed lawyer of considerable skill. (T.C. Opinion at 6, December 8, 1993.)

Kennett Square II, supra, 645 A.2d at 476, n.1.

The Petitioner failed, as a result of his own legal maneuverings, to file a timely petition for allocatur to the Pennsylvania Supreme Court. Your Honorable Court is therefore without jurisdiction to review the underlying decision of the intermediate appellate court. As a result the petition for certiorari should be denied for want of jurisdiction.

II.

ASSUMING JURISDICTION EXISTS, PETITIONER HAS RAISED NO LEGITIMATE CONSTITUTIONAL ISSUES, AND THE PETITION FOR CERTIORARI SHOULD THEREFORE BE DENIED.

If, despite the Petitioner's failure to seek timely review by the Pennsylvania Supreme Court, the petition for certiorari is considered properly before your Honorable Court, the Petitioner nonetheless has failed to state a single valid constitutional argument meriting certiorari. The Petitioner's arguments will be addressed in the order raised by his Petition.

A. Fourteenth Amendment—Adequacy of Respondent's Property Maintenance Ordinance.

The Borough's property maintenance code is exactly the type of municipal ordinance specifically authorized by the Pennsylvania Legislature and its enforcement relates directly to the health, safety and general welfare of the community. Use of the property maintenance code is consistent with the practice of municipalities nationwide and provides many of the minimum housing standards designed to protect and benefit residents of the community.

The property maintenance code, adopted within the police power of the Borough, is presumed to be in furtherance of the public health, safety, morals and welfare, *Phillips v. Borough of Folcroft*, 403 A.2d 194 (Pa. Cmwlth. 1979), and the burden is on the Petitioner to overcome this presumption. Contrary to Petitioner's argument, the evidence does not establish that the Borough's property maintenance code is unreasonable or that is was oppressively enforced.

The necessity of regulations respecting the repair of buildings in crowded centers has been long recognized. *McQuillin Mun. Corp*, §24.504 (3d Ed). The enactment and enforcement of such codes constitutes a legitimate governmental function, the primary purpose of which is to secure to the municipality as a whole the benefits of a well ordered municipal government and to protect the health and secure the safety of occupants of buildings. *McQuillin Mun. Corp*, §24.507 (3d Ed).

Petitioner rests his averment that the Borough's property maintenance code is unreasonable due to the alleged "minimal" nature of the violations, but cites no pertinent law in support of this argument. In fact, the cases utilized in support of the argument include one where an ordinance requiring the installation of bathroom facilities was deemed confiscatory due to the excessive costs of making the required improvements. *Dente v. Mt. Vernon*, 50 Misc. 2d 983, 272 N.Y.S. 2d 65 (1966). There is no evidence of record in the case *sub judice* regarding the cost of repairs and one would assume that if the violations were *de minimis*, as Petitioner argues, the cost would not be excessive. Additionally, the vast majority of states recognizes the constitutionality of statutes which establish minimum property maintenance standards. *See State v. Schaffel*, 229 A.2d 552 (Conn. Cir. 1966); *Louisville v. Thompson*, 339 S.W. 2d 869 (Ky. 1960); *St. Louis v. Nash*, 260 S.W. 985 (Mo. 1924); *Tenement House Department v. Moeshen*, 72 N.E. 231 (N.Y. 1904), *aff'd*, 203 U.S. 583 (1906); *Richards v. Colombia*, 88 S.E. 2d 683 (S.C. 1955); *Spear v. Ward*, 74 So. 27 (Ala. 1917); *Chicago v. Miller*, 188 N.E. 2d 694 (Ill. 1963), *appeal dismissed*, 375 U.S. 11 (1963); *R.S. Construction Company v. Baltimore*, 309 A.2d 629 (Md. 1973); *Newark v. Charles Realty Company*, 86 A.2d 33 (N.J. Super. 1952); *Pickwick Realty Co. v. Housing Appeals Board*, 12 Ohio Misc. 245, 232 N.E. 2d 427 (Ohio 1965); *Paquette v. Fall River*, 155 N.E. 2d 775 (Mass. 1959).

Regardless of the law in other jurisdictions, the Pennsylvania Legislature has specifically directed boroughs to enact the type of ordinance which Petitioner challenges. Authority is found in 53 P.S. § 4104 which states:

> In order to promote the public health, safety, morals and general welfare, all . . . boroughs . . . in this Commonwealth are hereby authorized and empowered to enact and enforce suitable ordinances to govern and regulate the . . . repairs, occupation, . . . maintenance, sanitation, . . . ventilation, toilet facilities, use and inspection of all buildings and housing . . . . Such ordinances may adopt any standard building code . . . covering any or all the above items.

Statutory authority is also found in the Borough Code which states:

> Among the specific powers of the boroughs shall be the following . . . (24) *Building, Housing and Plumbing Regulations*: To enact and enforce ordinances relating to buildings and housing, their . . . repair and maintenance and all facilities and services in or about such buildings or housing . . . . Any such ordinance may be adopted by reference to a standard building code or housing code or to parts thereof . . . .

53 P.S. §46202(24).

Generally, an ordinance will not be considered so arbitrary as to be unconstitutional when the Pennsylvania Legislature has

specifically authorized it. *Henley v. Zoning Hearing Board of West Fallowfield Township*, 625 A.2d 132 (Pa. Cmwlth. 1992). The specific authorization cited above distinguishes the Borough's property maintenance code from the sanitary sewage disposal system ordinance found unauthorized in *Holland Enterprises, Inc. v. Joka*, 439 A.2d 876 (Pa. Cmwlth. 1982). Although Petitioner cites *Holland Enterprises, Inc.* in support of his argument, that case involved a municipality attempting to use only its general police power to justify an ordinance establishing regulations in an area already preempted by the Pennsylvania Legislature.

Petitioner's assertion that the issue of the repair and maintenance of his apartment buildings should be solely between himself and his tenants is also without foundation in the law. Were this assertion accepted, the Commonwealth Court would have to disregard the specific authorization of the Pennsylvania legislation and declare property maintenance regulations unauthorized throughout the state. Such a position is unsupportable. An ordinance enacted pursuant to express and specific legislative authorization may be declared void as unreasonable, arbitrary and impressive only in extreme cases, if at all. The discretion to authorize a municipality to enact certain ordinances is for the Legislature to decide. *McQuillin Mun. Corp.*, § 18.02 (3d Ed).

Although Petitioner argues that the property maintenance code adversely affects the legitimate use of his property and that it interferes with housing for "low and moderate income" persons, this case has nothing to do with exclusionary zoning and the record contains no evidence to support any allegation regarding the income of Petitioner's tenants. Petitioner's use of his apartment buildings as a multi-family tenement remains unchanged. Petitioner is simply prohibited from allowing these buildings to become dilapidated. The tenants, regardless of

their income, can only be benefited from the Borough's insistence that their landlord adequately maintain their homes.

Petitioner's further allegation that the Borough's enforcement of its property maintenance code is so oppressive as to be unconstitutional is also without merit. The record discloses that the Borough notified Petitioner of the outstanding violations and gave him several months to initiate repairs. Additionally, Petitioner was provided an appeal to the Borough Building and Fire Appeals Board prior to the issuance of any citations. Indeed, Petitioner has been provided with three separate evidentiary hearings on the subject violations prior to his appeal to the Commonwealth Court. It would have been far less reasonable for the Borough to allow the conditions it observed to remain uncorrected.

The trial record is devoid of any substantive evidence to support Petitioner's claim that the ordinance was selectively or discriminatorily enforced. (N.T. 6/7/94, pp. 127-132). Further, as noted by the Commonwealth Court, Petitioner has, without foundation, raised the issue of constitutionality of property maintenance ordinances as a mantra in various cases. *Lal v. Borough of Kennett Square (Kennett Square III), supra,* 665 A.2d at 19, *citing Kennett Square II, supra; Thornbury Township, supra.*

B. Eighth Amendment—Excessive Fines

Petitioners argument concerning excessive fines is also without merit. The Commonwealth Court properly recognized the rule:

> In response to Lal's attacks against the trial court's sentence as excessive, this court stated in *Kennett Square I:*

> [T]he trial court should weigh all mitigating and aggravating factors and arrive at an appropriate sentence that is consistent with the protection of the public and the gravity of the offense .... Considerations should include the history and character of the defendant, the nature and circumstances of the crime .... Finally, if a sentence imposed is within the statutory limits, there is no abuse of discretion unless the sentence is manifestly excessive so as to inflict too severe a punishment.

Borough of Kennett Square v. Lal (Kennett Square III), supra, 665 A.2d at 19, *quoting Kennett Square I, supra,* 643 A.2d at 1175 (alterations in original). The rule stated mirrors 42 Pa.C.S.A. § 9726(a), which authorizes fines as a sentencing penalty, and allows a court to impose fines "having regard to the nature and circumstances of the crime and to the history and character of the defendant . . ." In this case, the sentencing court was knowledgeable that the Petitioner had committed over 225 housing and building code violations. Borough's Pre-Sentencing Memorandum. Such previous violations have been deemed relevant at the sentencing of this particular defendant. *Commonwealth v. Lal,* 627 A.2d 281 (Pa. Cmwlth. 1993), *appeal denied,* 647 A.2d 512 (1993). Applying the rule to the instant case, the Commonwealth Court stated in *Kennett Square III*:

> Judge Gavin reduced the maximum fine of $24,000 imposed by the district justice to $14,550 after properly considering the entire record and Lal's history. Absolutely

> no judicial abuse of discretion has been demonstrated by Lal in this context, nor has he otherwise shown any basis for his claims of violation of the Excessive Fines Clause of the Eight Amendment.

Kennett Square III, supra, 665 A.2d at 19.

As to the Petitioner's attempt to draw the separate equity case into his "excessive fines" calculus, the Respondent notes that the so-called "fines" in that case, *Borough of Kennett Square v. Lal (Kennett Square II), supra,* 645 A.2d 474, actually consisted of an order by which an agent, *appointed to act on Petitioner's behalf,* would direct rental income in the following order: mortgage payments, operating expenses, repairs, creation of a maintenance escrow fund, with remainder to Petitioner. This directed rental income accrued to the benefit of Petitioner and his properties, and is not a "fine" at all. *See* Trial Court Order of December 8, 1993, Petition Appendix F. Despite Petitioner's attempts to mischaracterize the purpose of the funds allocated by the agent, the trial court's order speaks for itself.

C. Fifth Amendment—Double Jeopardy

The Commonwealth Court immediately recognized Petitioner's double jeopardy argument as "wholly frivolous." *Borough of Kennett Square v. Lal (Kennett Square III), supra,* 665 A.2d at 18. The court stated:

> Proceeding in equity for injunctive relief and for the appointment of an agent to manage Lal's property does not preclude the filing of summary offenses for violation of the ordinance, punishable by fine.

> Moreover, any contention that double jeopardy attaches because the Borough proceeded in equity to secure appointment of an agent and initiated the summary citation proceedings as well is wholly frivolous. The Fifth Amendment double jeopardy clause prohibits a *second* criminal punishment for the *same* criminal offense. *Helvering v. Mitchell*, 303 U.S. 391, 58 S.Ct. 630, 82 L.Ed. 917 (1938)

Id. Other Pennsylvania courts have similarly held that civil proceedings brought to address conduct which may be the basis for a criminal prosecution cannot violate the rule against double jeopardy. *Jordan v. Gore*, 431 A.2d 300 (Pa. Super. 1981); *Zanotto v. Commonwealth, Department of Transportation*, 475 A.2d 1375 (Pa. Cmwlth. 1984). Consequently, a double jeopardy challenge is inapplicable to the present circumstances.

D. Sixth Amendment—Right to Counsel

The Commonwealth Court correctly recognized that the trial court properly refused to grant Petitioner a third continuance to acquire counsel, and agreed further that the constitutional right to counsel did not attach in these proceedings. Consequently, Petitioner's argument on this issue must fail.

Despite Petitioner's practiced misapplication of constitutional law, it is clear that the protections of the state and federal constitutions with respect to representation of counsel apply only to situations where the possibility of imprisonment exists. *Borough of Kennett Square v. Lal, (Kennett Square I), supra*, 643 A.2d at 1175-1176; *Thornbury Township v. Lal,*

supra. This right does not apply where, as here, a defendant is prosecuted for a summary offense punishable only by a fine. In *Bacik v. Commonwealth*, 434 A.2d 860 (Pa. Cmwlth. 1981), *appeal dismissed*, 456 U.S. 967 (1982), the Commonwealth Court found that the right to counsel did not apply to a defendant convicted of violating a township ordinance where the penalty was a fine.

Although Petitioner attempts to distinguish the circumstances in this case from those in *Kennett Square I, supra*, his argument that he could be imprisoned for contempt if he fails to pay fines does not present distinguishing circumstances and is unpersuasive. These summary citation proceedings are wholly separate from a hypothetical future civil contempt hearing should Petitioner choose not to abide by the order of court sentencing him to pay fines. Such a contempt proceeding was also possible in *Kennett Square I, supra*. Under such circumstances, imprisonment would only occur due to Petitioner's recalcitrance in the face of a direct court order and not as a result of a penalty for the property maintenance violations.

The Commonwealth Court recognized that the right to counsel argument was addressed at length in *Kennett Square I, supra*, and concluded:

> Accordingly, no Sixth Amendment rights attach to the instant case. The contention that imprisonment may result upon a finding of contempt for failure to pay a fine does not distinguish Lal's case from well-established law. Any possibility of imprisonment in that event would result not from a violation of the Building Code, but rather from a separate and distinct act of contempt on Lal's part

upon a finding by the court.

Kennett Square III, supra, 665 A.2d at 19.

Petitioner's further allegation that the lower court should have granted him a third continuance is equally without merit. When the court convened on June 6, 1994, Petitioner's continuance motion was based upon his failure to obtain counsel. The court, however, had informed him on two prior occasions that he must proceed without counsel if he did not acquire counsel before trial. (N.T. 4/13/94, pp. 10-11; N.T. 4/29/94, pp. 8-11). Petitioner had given neither the Borough nor the Court prior notice that he would be seeking a continuance as required by Pa. R. C. P. 216(C),[4] and failed to meet any of the criteria listed in Pa. R. C. P. 216(A).[5] Under these circumstances, the lower court's decision to proceed with trial was not an abuse of discretion.

The Court has traditionally had wide discretion to grant or deny a continuance request. Only in extreme cases does the denial of a continuance motion constitute a denial of due process. *Commonwealth v. Howard,* 353 A.2d 438 (Pa. 1976). A trial court's denial of a continuance request will not be reversed without a palpable and prejudicial abuse of discretion. *Commonwealth v. Kizbach,* 373 A.2d 118 (Pa. Super. 1976); *Commonwealth v. Smith,* 275 A.2d 98 (Pa. 1971). Because the decision to grant or refuse a continuance is an inherent power of the trial court and is a discretionary matter, the exercise of this discretion will not be overturned except upon a clear showing of

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4. Chester County, Pennsylvania Rules of Criminal Procedure (C. C. R. Crim.P. 301(a)(1)) state that Pa. R. C .P. 216 shall be followed with respect to continuance requests in Chester County criminal cases.

5. The grounds for continuance include, *inter alia,* agreement of all parties, illness, or special ground allowed in discretion of court.

abuse. *Re: Right of Way for Legislative Route 1023*, 406 A.2d 819 (Pa. Cmwlth. 1979). A court's use of this discretion is not altered even where the reason cited by the Petitioner is to obtain counsel. The right to choose counsel is not absolute and must be balanced against the public need for efficient and effective administration of criminal justice. *Commonwealth v. Gray*, 608 A.2d 534 (Pa. Super. 1992). The right to choose counsel must be exercised at a reasonable time and at a reasonable matter. *Commonwealth v. Novak*, 150 A.2d 102 (Pa. 1959).

Unfortunately, there is also evidence in the record to indicate that Petitioner's third continuance request was not made in good faith. By the time Petitioner made this last continuance request, it was clear that he had taken time to develop a variety of meritless technical objections leading the court to conclude that Petitioner was simply flaunting his knowledge of the law. (N.T. 6/6/94, pp. 18-19). This type of conduct is relevant to the issue of continuance since a court must not allow a defendant to subvert judicial proceedings or cause undue delay by requesting the designation of a certain lawyer to represent him. Nor must a court honor a belated continuance request made not in good faith but as a transparent ploy for delay. *United States v. Rankin*, 779 F.2d 956 (3d Cir. 1986).

E. Fourteenth Amendment—Due Process/Election of Remedies

Finally, Petitioner makes the specious argument that the Respondent having commenced a separate and distinct equity action, was barred from prosecuting the summary offenses instantly at issue. *Citing Kennett Square I, supra,* the Commonwealth Court recognized this argument as "totally devoid of merit." *Kennett Square III, supra*, 665 A.2d at 17.

Indeed, the doctrine of election of remedies is inapplicable to this matter since the actual circumstances, relief prayed for and causes of action in this municipal violation proceeding and the equity case are distinct. The property maintenance code violations committed by Petitioner in these consolidated cases occurred on the specific dates of March 24 and 27, 1993, notwithstanding Petitioner's knowledge of their existence for at least three months. These continuing violations necessitated the institution of summary criminal proceedings, where the only remedies permitted were fines, 53 P.S. §§ 48301, 48308, and the burden of proof was beyond a reasonable doubt. *See Borough of West Chester v. Lal,* 426 A.2d 603 (Pa. 1981).

In contrast, the equity action, referred to by Petitioner, constituted a civil proceeding, 53 P.S. § 46202(24), brought in response to the failure of a multiplicity of legal actions to provide an adequate incentive for Petitioner to properly maintain his apartment buildings. In equity, the Borough alleged irreparable harm and sought a court order appointing a local agent to assist Petitioner in bringing the buildings up to code and the creation of an escrow fund to fund future maintenance.

Generally, a party may have as many remedies as the law gives provided that they are consistent. To be regarded as inconsistent, the remedies in question must be different means of adjudicating the same issues, P.L.E., *Election of Remedies,* §§ 3 and 4, and pursuit of one remedy necessarily implies the negation of the other. *Nuside Metal Products, Inc. v. Eazor Exp. Inc.,* 152 A.2d 275 (Pa. Super. 1979); *Pittsburgh Union Stockyards Co. v. Pittsburgh Joint Stockyards Co.,* 163 A. 668 (Pa. 1933).

A specific method of determining whether both actions are the same and an election of remedies warranted is to determine

if the proof necessary to support both actions is the same or different. Where the proof is different, no election is necessary. *Simpson v. Equitable Life Assurance Society of the United States*, 193 A. 309 (Pa. Super. 1937). Certainly, using this test, the municipal violation citations and the equity action are different matters. The former is a criminal proceeding necessitating proof beyond a reasonable doubt of various elements relating to the specific underlying violations. The latter is a civil proceeding requiring a lower burden of proof to demonstrate that a multiplicity of legal actions has failed to remedy an irreparable harm. The citation proceedings involved penalties in the nature of fines while the equity action sought a court order appointing a local agent and establishing an escrow fund for the future repair and maintenance of the subject apartment buildings.

In *Commonwealth, Department of Environmental Protection v. Pennsylvania Power Company*, 384 A.2d 273 (Pa. Cmwlth. 1978), *rev'd and remanded on other grounds*, 490 Pa. 399, the Commonwealth Court addressed the doctrine of election of remedies and found that an equity action brought to compel compliance with the Commonwealth's air pollution regulations was not inconsistent with a later penalty action brought by the DEP for numerous specific violations of the DER pollution control regulations. These actions were deemed to be supportive of each other, not repetitive or inconsistent, or in violation of the doctrine of election of remedies. Like the DEP in *Commonwealth, Department of Environmental Protection v. Pennsylvania Power Company*, the Borough instituted the action *sub judice* seeking penalties due to Petitioner's specific violations and instituted the equity action to compel future compliance with the Borough's property maintenance code. *See also, Pawk v. Commonwealth, Department of Environmental Resources*, 395 A.2d 692 (Pa. Cmwlth. 1978). Due process or equal protection theories are simply not implicated.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied for want of jurisdiction, or denied for lack of substantive merit.

Respectfully submitted,

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